

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

MELINDA KILIAN,	)
	) No. CV-04-3091-MWL
Plaintiff,	)
	) ORDER GRANTING DEFENDANT'S
v.	) MOTION FOR SUMMARY JUDGMENT
	)
JO ANNE B. BARNHART,	)
Commissioner of Social	)
Security,	)
	)
Defendant.	)
	)

BEFORE THE COURT are cross-Motions for Summary Judgment, noted for hearing without oral argument on April 4, 2005. (Ct. Rec. 11, 15.) Attorney D. James Tree represents Plaintiff; Special Assistant United States Attorney David M. Blume represents the Commissioner. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 6.) After reviewing the administrative record and the briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 11) and **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 15).

Plaintiff filed her current application for disability insurance benefits ("DIB") in March of 2002 (Tr. 80.) At the hearing Plaintiff alleged an amended onset date of January 1, 1998

1 due to spondylolisthesis. (Tr. 224-25.) Plaintiff previously filed  
2 an application in 1993 alleging an onset date of October 13, 1992  
3 based on back pain and right leg numbness. (Tr. 25-26.) That claim  
4 was denied and Plaintiff did not appeal. Administrative Law Judge  
5 (hereinafter, "ALJ,") Thomas Gaye held a hearing on June 13, 2003.  
6 (Tr. 205.) The ALJ issued his decision denying benefits October 22,  
7 2003, after finding that Plaintiff had not established changed  
8 circumstances to rebut the presumption of continuing non-  
9 disability. (Tr. 17.) The Appeals Council denied review. The matter  
10 is before this court pursuant to 42 U.S.C. § 405(g).

#### 11 ADMINISTRATIVE DECISION

12 Because the second ALJ found that Plaintiff had not  
13 established a change in circumstances after the first unappealed  
14 decision, he adopted the findings of the first ALJ. Plaintiff had  
15 not engaged in substantial gainful activity during the period at  
16 issue. (Tr. 20.) The ALJ found that before the amended onset date  
17 of December 31, 1998, Plaintiff suffered from the severe  
18 impairments of congenital spondylolisthesis and obesity. (Tr. 20.)  
19 He found that Plaintiff's impairments do not meet or equal the  
20 requirements of the Listings. (Tr. 20.) The ALJ found that  
21 Plaintiff had the residual functional capacity ("RFC") for  
22 sedentary work during the relevant period. (Tr. 20-21.) He  
23 determined that Plaintiff was unable to perform her past relevant  
24 work. (Tr. 21.) At step five, the ALJ relied on the Grids and  
25 determined that Plaintiff could perform other work existing in  
26 significant numbers in the national economy. (Tr. 21.) The ALJ  
27 found Plaintiff was not disabled.



1 The Commissioner has established a five-step  
 2 sequential evaluation process for determining whether a  
 person is disabled. 20 C.F.R. §§ 404.1520, 416.920; *Bowen*  
*v. Yuckert*, 482 U.S. 137, 140-42 (1987).

3 Step 1: Is the claimant engaged in substantial gainful  
 4 activities? 20 C.F.R. 404.1520(a)(4)(i), 416.920(a)(4)(i). If  
 so, benefits are denied. If not, the decision maker proceeds  
 to step two.

5 Step 2: Does the claimant have a medically severe  
 6 impairment or combination of impairments? 20 C.F.R.  
 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the claimant does  
 7 not have a severe impairment or combination of impairments,  
 the disability claim is denied. If the impairment is severe,  
 the evaluation proceeds to step three.

8 Step 3: Does the claimant's impairment meet or equal one  
 9 of the listed impairments acknowledged by the Commissioner to  
 be so severe as to preclude substantial gainful activity? 20  
 10 C.F.R. 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20 C.F.R. 404  
 Subpt. P, App. 1. If the impairment meets or equals a listed  
 11 impairment, the claimant is conclusively presumed to be  
 disabled. If the impairment does not meet or equal a listed  
 impairment, the evaluation continues to step four.

12 Step 4: Does the impairment prevent the claimant from  
 13 performing past relevant work? 20 C.F.R. 404.1520(a)(4)(iv),  
 416.920(a)(4)(iv). At this step, the decision maker determines  
 14 the claimant's residual functional capacity. If the claimant  
 can perform past relevant work, the claimant is not disabled.  
 15 If the claimant cannot perform past work, the decision maker  
 continues to step five.

16 Step 5: Is the claimant able to perform other work in the  
 17 national economy considering age, education, work experience  
 and residual functional capacity? 20 C.F.R. 404.1520(a)(4)(v),  
 416.920(a)(4)(v).

18 The claimant bears the initial burden of proving  
 19 disability. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
 1999). This requires the presentation of "complete and  
 20 detailed objective medical reports of h[is] condition from  
 licensed medical professionals." *Id.* (citing 20 C.F.R. §§  
 404.1512(a)-(b), 404.1513(d)). At step five, the burden shifts  
 21 to the Commissioner to show that (1) the claimant can perform  
 other substantial gainful activity; and (2) a "significant  
 22 number of jobs exist in the national economy" which claimant  
 can perform. *Kail v. Heckler*, 722 F. 2d 1496, 1498 (9<sup>th</sup> Cir.  
 23 1984).

## 24 ISSUES

25 Whether there is substantial evidence to support the ALJ's  
 26 decision to deny benefits and, if so, whether that decision was  
 27 based on proper legal standards. Plaintiff contends that the ALJ  
 28 erred by finding no change in circumstances to rebut the

1 presumption of continuing non-disability after the first decision;  
2 by rejecting Dr. Swofford's opinion, and by finding Plaintiff not  
3 disabled at step five. (Ct. Rec. 12 at 10.)

#### 4 ADMINISTRATIVE HEARING

5 Plaintiff was 31 years old at the time of the first ALJ's  
6 decision. (Tr. 18; 32.) She has a high school education and one  
7 year of college. (Tr. 78.) Plaintiff has worked as an extruder  
8 operator and as a waitress. (Tr. 81.) On average Plaintiff has to  
9 lie down about half of the day. (Tr. 220.) She cannot climb stairs  
10 and needs a wheelchair for shopping and family outings. (Tr. 93;  
11 95.)

#### 12 ANALYSIS

##### 13 Rebutting Presumption of Continuing Non-Disability 14 Based on Changed Circumstances

15 Plaintiff contends the ALJ erred by finding that there was no  
16 change in circumstances between the first denial of benefits and the  
17 second sufficient to overcome the presumption of continuing  
18 nondisability. (Ct. Rec. 12 at 13.) She relies on worsening obesity  
19 and mental impairments as changed circumstances. (Ct. Rec. 16.) The  
20 Commissioner responds that the ALJ's determination is correct because  
21 there is essentially no evidence of worsening obesity or mental  
22 impairments before Plaintiff's last insured date of December 31, 1998.  
(Ct. Rec. 16 at 8.)

23 As noted, the first ALJ found Plaintiff was not disabled.  
24 Plaintiff did not appeal this determination. Pursuant to 42 U.S.C. §  
25 405(h), that finding became binding under principles of *res judicata*.  
26 See *Taylor v. Heckler*, 765 F. 2d 872, 975 (9<sup>th</sup> Cir. 1985); *Stuckey v.*  
27 *Weinberger*, 488 F. 2d 904 (9<sup>th</sup> Cir. 1973) (en banc). *Res judicata* is  
28

1 properly applied in the administrative context, although in this  
2 context "the *res judicata* doctrine is not as rigid as it is with  
3 courts." *Lyle v. Secretary of Health and Human Services*, 700 F. 2d  
4 566, 568 at n. 2, quoting *Stuckey*, 488 F. 2d at 911.

5 The presumption of continuing non-disability may be overcome if  
6 Plaintiff shows changed circumstances. *Id.* The second ALJ points out  
7 several types of changes in circumstance that courts have found may  
8 rebut the presumption:

9 "A claimant may rebut the presumption by showing a  
10 'changed circumstance' affecting the issue of  
11 disability with respect to the unadjudicated period,  
12 e.g., a change in the claimant's age category . . .  
13 an increase in the severity of the claimant's  
14 impairments, *the alleged existence of an*  
15 *impairment not previously considered*, or a change in the  
16 criteria for determining disability."

17 Tr. 18. (*italics added*).

18 Plaintiff alleges her circumstances have changed because she  
19 suffers from mental impairments, specifically, anxiety and depression.  
20 (Ct Rec. 12 at 14-16.) Plaintiff's prior application did not allege  
21 a mental impairment, so it was not considered by the first ALJ. It was  
22 not argued to the second ALJ. The unadjudicated period in this case  
23 is the date of the first decision, March 25, 1994, through the date  
24 of last insured, December 31, 1998. (Tr. 18.) Plaintiff contends that  
25 the recent ALJ committed reversible error by failing to call a medical  
26 expert to determine the date of onset of mental impairments. The  
27 Commissioner responds that there is no medical evidence of a mental  
28 impairment until March of 2000 - well after the Plaintiff's date of  
last insured. (Ct. Rec. 16 at 10.)

The Commissioner is correct. The first evidence in the record of  
a mental impairment is a notation from the Swofford Clinic on March

1 13, 2000, that because Plaintiff wanted to quit smoking and was  
2 "somewhat tearful," Wellbutrin was prescribed. (Tr. 199.)  
3 Additionally, the evidence shows that Plaintiff reported her  
4 depression "improved significantly" on medication. (Tr. 148.)

5 Plaintiff fails to rebut the presumption of continuing non-  
6 disability with respect to claimed mental impairments. Alternatively,  
7 even if *res judicata* should not be applied, there is simply no  
8 evidence that Plaintiff suffered a mental impairment before her date  
9 of last insured.

10 Plaintiff alleges that obesity is an impairment that has worsened  
11 since the prior decision, also constituting a change of circumstance.  
12 (Ct. Rec. 12 at 16.) The Commissioner responds that "[h]er weight  
13 increase does not, however, necessarily mean that the functional  
14 limitations obesity caused increased as well. . . although Plaintiff's  
15 weight increased during the functional period, the record does not  
16 indicate that this increase added to the functional limitations her  
17 obesity already caused, as shown below by the sparse medical records  
18 from that period." (Ct. Rec. 16 at 10-11.)

19 The first ALJ found Plaintiff's obesity was a severe impairment,  
20 though not sufficient to meet or equal the Listings. (Tr. 26-27.) As  
21 noted by the Commissioner, the record shows that Plaintiff gained 24  
22 pounds between May of 1993 (just after filing her application) and  
23 December of 1998, weighing 210 pounds and 234 pounds, respectively and  
24 standing 5'4". (Ct. Rec. 16 at 10.)

25 At the first hearing on December 15, 1993, the ALJ states:

26 "[Plaintiff] testified that she lives with her  
27 husband and two children, ages three and five.  
28 The husband works 12 hours a day and the claimant  
takes care of the children. She does all the  
housework, the cooking, laundry and grocery shopping.

1 She goes to watch her husband play softball . . .  
2 The children get things for her and her mother helps  
her every day . . .

3 Her testimony that she was instructed to  
4 stop exercising is unsupported by the record.  
5 To the contrary, Dr. Camp emphasized the  
6 importance of physical conditioning. . . The  
claimant's disregard of medical advice suggests  
that her symptoms are not as severe as alleged."

7 Tr. 29-30.

8 It is difficult to see how a weight gain of 24 pounds is a  
9 changed circumstance establishing a worsening of Plaintiff's  
10 condition. There is no medical evidence for 1995 or 1996. In 1997,  
11 Plaintiff reported back pain twice, possible related to kidney stones.  
12 (Tr. 192.) In March of 1998, Plaintiff again had kidney stones. (Tr.  
13 192-93.) This is the extent of the medical evidence regarding  
14 Plaintiff's back pain before her last insured date. The scant evidence  
15 of back pain appears to be related to kidney stones, an impairment  
16 unrelated to obesity. Alternatively, even if *res judicata* should not  
17 be applied, there is no evidence that a weight gain of 24 pounds had  
18 any effect on Plaintiff's level of impairment before December 31,  
19 1998. The court addresses the remaining issues on the merits as an  
alternative holding.

## 20 2. Weighing the Treating Physician's Opinion

21 Plaintiff contends that the ALJ erred by failing to properly  
22 credit the opinion of her treating physician, J. Swofford, M.D. (Ct.  
23 Rec. 12 at 17.) The Commissioner responds that the ALJ appropriately  
24 rejected Dr. Swofford's opinion because it is unsupported by the  
25 record as a whole; additionally, the opinion of consulting physician  
26 Charles Wolfe, M.D., is consistent with the medical evidence. (Ct.  
27 Rec. 16 at 12-13.)  
28



1 The opinion of a non-examining physician may constitute  
2 substantial evidence if it is supported by other evidence and is  
3 consistent with it. *Andrews v. Shalala*, 53 F. 3d 1035, 1043 (9<sup>th</sup> Cir.  
4 1995); *Lester v. Chater*, 81 F. 3d 821, 830-31 (9<sup>th</sup> Cir. 1995). The  
5 opinion of a non-examining physician cannot by itself constitute  
6 substantial evidence that justifies the rejection of either an  
7 examining or a treating physician. *Lester*, at 831 citing *Pitzer v.*  
8 *Sullivan*, 908 F. 2d 502, 506 n. 4 (9<sup>th</sup> Cir. 1990). An ALJ may reject  
9 the opinion of a physician if it is brief, conclusory, and unsupported  
10 by clinical findings. *Matney v. Sullivan*, 981 F. 2d 1016, 1019 (9<sup>th</sup>  
11 Cir. 1992).

12 The ALJ properly rejected Dr. Swofford's opinion that Plaintiff  
13 was unable to work after January 1, 1998 because it was both  
14 conclusory and unsupported by clinical findings. As indicated, there  
15 is no medical evidence for 1995 or 1996. Twice in 1997 Plaintiff  
16 reported back pain, possibly related to kidney stones. (Tr. 192.) In  
17 March of 1998 she again had kidney stones. (Tr. 192-93.) This is the  
18 evidence of Plaintiff's back pain before her last insured date. The  
19 ALJ correctly rejected Dr. Swofford's retrospective opinion that  
20 Plaintiff was unable to work as of January 1, 1998 because it was  
21 unsupported by the medical evidence.

22 As the Commissioner notes, the ALJ also relied on the testimony  
23 of consulting physician Charles Wolfe, M.D. (Ct. Rec. 16 at 13.) After  
24 Dr. Wolfe reviewed the record, he concluded that as of the last  
25 insured date, Plaintiff was able to work at a sedentary level. This  
26 is consistent with the very sparse medical records and provided an  
27 additional and proper basis for the ALJ to reject Dr. Swofford's  
28 conclusions.

1                   3. Improper Step Five Analysis

2           Plaintiff posits that the ALJ erred in his step five analysis by  
3 relying on the Grids rather than on the vocational expert's testimony  
4 in deciding that Plaintiff is not disabled. (Ct. Rec. 12 at 18.)  
5 Citing *Macri v. Chater*, 93 F. 3d 540, 545 (9<sup>th</sup> Cir. 1996), the  
6 Commissioner answers that the ALJ correctly relied on the Grids  
7 because Plaintiff's alleged pain and mental impairments are  
8 insignificant nonexertional limitations. (Ct. Rec. 16 at 13.) The  
9 Commissioner notes that the ALJ properly rejected the hypothetical  
10 propounded by Plaintiff to the vocational expert because it was based  
11 on Dr. Swofford's discredited limitations. (Ct. Rec. 16 at 13-14.)

12           With respect to pain as a non-exertional limitation, Plaintiff  
13 told the first ALJ that she engaged in a wide range of activities of  
14 daily living. He found this testimony weighed against finding  
15 Plaintiff's complaints of disabling pain credible. (Tr. 29-30.) The  
16 court has addressed Plaintiff's alleged mental impairment.

17           An ALJ may properly rely on the Grids at step five if  
18 nonexertional limitations are insignificant. *Macri v. Chater*, 93 F.  
19 3d 540, 545 (9<sup>th</sup> Cir. 1996). Plaintiff failed to establish that she  
20 suffered significant nonexertional impairment, caused by back pain or  
21 mental impairment, before December 31, 1998. The ALJ could therefore  
22 appropriately rely on the Grids.

23           The ALJ need not accept a VE's testimony if the hypothetical  
24 incorporates discredited limitations. When asked a hypothetical  
25 incorporating Plaintiff's established impairments, the VE testified  
26 that someone with Plaintiff's limitations could perform sedentary work  
27 in the local and national economies. There was no error at step five.

Conclusion

Having reviewed the record and the ALJ's conclusions, this Court finds that substantial evidence supports the ALJ's findings and that his decision is free of legal error; therefore, remand is unnecessary.

Accordingly,

**IT IS ORDERED:**

1. Plaintiff's Motion for Summary Judgment (Ct. Rec. 11) is **DENIED**.

2. The Commissioner's Motion for Summary Judgment (Ct. Rec. 15) is **GRANTED**.

3. Any application for attorney fees may be filed by separate Motion.

4. The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant and the file **CLOSED**.

**DATED** this 15th day of April, 2005.

s/ Michael W. Leavitt

MICHAEL W. LEAVITT

UNITED STATES MAGISTRATE JUDGE